



73-SBE-029

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HENRY C. BERGER)

For Appellant: J. R. MacMahon
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

Gary M. Jerrit
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Henry C. Berger against proposed assessments of additional personal income tax in the amounts of \$3,656 and \$3,654 for the years 1968 and 1969, respectively.

The sole question for determination is whether appellant was a California resident in 1968 and 1969 for purposes of the California Personal Income Tax Law.

Appellant has been a pilot for Braniff Airways, Inc., (hereafter Braniff) since 1942. He was based in Miami, Florida, from 1959 until December 1967, when at his request he was transferred to California. Upon being transferred, appellant relinquished the furnished apartment

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which had been his only Florida residence following a legal separation from his wife in 1965. His request for transfer was motivated, at least in part, by the desire to escape from rather bitter property settlement proceedings in connection with his divorce in 1967. The divorce decree awarded their Florida home to the wife, and she received custody of their children.

Appellant's assignment in California was to make military charter flights from Travis Air Force Base to Southeast Asia under a contract between Braniff, and the United States Government. The contract was originally for one year, from July 1, 1966, to June 30, 1967, but was renewed annually until finally terminated on June 30, 1972. There is no indication that appellant either asked for or received any assurances from Braniff as to the length of his California- assignment. When he arrived in California appellant took a one-year lease on an unfurnished apartment in Kentfield, buying furniture locally; when that lease expired, he took a year-to-year lease on an unfurnished apartment in Tiburon. The latter lease contained a clause allowing him to terminate the lease in the event he was transferred. During the years on appeal he maintained no abode except these apartments in California. He bought a car here in 1968, registered it here, and secured a California driver's license. In 1968 he remarried, his new wife being a California resident.

During the years on appeal appellant spent approximately 12 days of each month flying, the rest of his time being about equally divided between California and Florida. His trips to Florida were primarily for the purpose of concluding matters connected with his divorce and disposing of various investments. He voted in Florida in 1968, and at all times he had a savings account and carried a loan with a Florida bank. That same bank is named executor in his will. He at all times maintained his membership in a Masonic lodge in Coral Gables, Florida.

Appellant filed separate nonresident California personal income tax returns for the years 1968 and 1969. Respondent determined that appellant was, for income tax purposes, a California resident during those years and

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that his entire income was therefore subject to tax in California. Appellant protested the resulting proposed assessments of tax, but his protest was denied and this appeal followed.

Section 17014 of the California Revenue and Taxation Code defines "resident" to include every individual who is in this state for other than a temporary or transitory purpose. The meaning of "temporary or transitory purpose" is discussed in regulation 17014-17016(b) of title 18 of the California Administrative Code. Appellant correctly quotes from this regulation the following: "[I]f an individual...is here...to...perform a particular contract,...which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here." Respondent points out that the regulation goes on to say:

If, however, an individual is in this State... employed in a position that may last permanently or indefinitely,...he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.

* * *

The underlying theory...is that the state with which a person has the closest connection during the taxable year is the state of his residence.

The purpose in adopting the present statutory definition of "resident" was to insure that all those who are in California for other than a temporary or transitory purpose, enjoying the benefits and protection of the state, should in return contribute to the support of the state. (Whittell v. Franchise Tax Board, 231 Cal. App. 2d 278 [41 Cal. Rptr. 673].)

We have recently applied the foregoing provisions in deciding two other appeals by Braniff pilots employed in California in connection with the same contract under which appellant here was employed. These were the Appeal

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of Warren L. and Marlys A. Christianson, decided July 31, 1972, and the Anneal of Donald E. and Betty J. MacInnes, decided October 24, 1972. In those cases we held that the Braniff contract, although renewed annually, was in reality a contract of indefinite duration. We further held that since the appellants in those cases were employed under that contract without any assurance as to the length of their employment, they were employed in this state in positions that could last permanently or indefinitely and were therefore residents for income tax purposes. We reached this conclusion although appellants in both cases retained several contacts with other states.

In the present case it is conceded that appellant is a domiciliary of Florida, but domicile is not determinative of residence for income tax purposes. Appellant here maintained fewer contacts with another state than did the appellants in Christianson and MacInnes. Considering the voluntary nature of appellant's presence in California and the substantial number of contacts he had with this state, we find no reason to reach any conclusion other than the one we reached in those earlier cases..

We must therefore sustain respondent's determination that appellant was a resident of California for tax purposes in 1968 and 1969.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Henry C. Berger against proposed assessments of additional personal income tax in the amounts of \$3,656 and \$3,654 for the years 1968 and 1969, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of May, 1973, by the State Board of Equalization.

William L. Sprague, Chairman
George J. Kelly, Member
John W. Lynch, Member
Robert H. ..., Member
_____, Member

ATTEST:

W. W. Dunlop, Secretary